Haas Electric, Inc. *and* IBEW Local No. 7, a/w International Brotherhood of Electrical Workers, AFL–CIO. Case 1–CA–30745

August 2, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On January 26, 1998, Administrative Law Judge Wallace H. Nations issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not violate the Act when it ceased recognizing the Union and unilaterally changed certain terms and conditions of employment.[2] Contrary to the judge, we find that the Respondent unlawfully abrogated the collective-bargaining agreements negotiated by the employer association to which it belonged and implemented unilateral changes in terms and conditions of employment.

Background

The Respondent was a party to successive collective-bargaining agreements with the Union[3] through membership in the western Massachusetts Chapter of NECA, a multiemployer association. On February 1, 1991, the Respondent signed a letter of assent, binding it to the collective-bargaining agreement that was effective retroactively from July 1, 1990, through June 30, 1993. The letter also authorized NECA to act as the Respondent's collective-bargaining representative with respect to current and subsequent labor agreements unless and until that authority was terminated in accordance with prescribed procedures.[4]

In the fall of 1991, NECA members, including the Respondent, began complaining that because of poor economic conditions in western Massachusetts, they needed concessions from the Union in order to compete with nonunion contractors. In a letter dated September 25, 1991, NECA requested that the 1990–1993 agreement be reopened for purposes of negotiating concessions. The Respondent was one of the contractors who signed the reopener request.

On January 2, 1992, the Respondent's president and owner, Frederick Haas, sent a letter to the Union, with a copy to NECA, announcing the Respondent's intent to terminate its agreement with the Union and to withdraw recognition effective 150 days from the date of the letter.[5] Neither the Union nor NECA replied to the letter, and the Respondent never carried out its threat to break off contractual relations in 1992. Rather, the Respondent continued to recognize the Union and abide by the agreement.

Meanwhile, in early 1992, the Union acquiesced in NECA's requests to reopen the contract, and the parties bargained from March to June 1992. Ralph Whitelock, the Respondent's vice president, attended these negotiations at Frederick Haas' instructions, and according to Union Business Manager Douglas Bodman, "offered quite a few suggestions of things that could help out." At no time during the negotiations did Whitelock state that

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Based on the staleness of the proffered evidence of majority status, we agree with the judge's finding that the Respondent and the Union maintained an 8(f) bargaining relationship at all times. We find it unnecessary to consider the judge's other reasons for making that finding.

[2] The Respondent admitted in its answer to the complaint that it withdrew recognition from the Union and unilaterally ceased applying the contract to its employees after June 30, 1993.

[3] In August 1988, Locals 36 and 284 merged to become Local 7, the Charging Party, here.

[4] The letter of assent provides, in pertinent part:

> [T]he undersigned firm does hereby authorize [NECA] as its collective bargaining representative for all matters contained in or pertaining to the current and any subsequent approved Inside labor agreement between [NECA] and [the Union] . . . . This authorization, in compliance with the current approved labor agreement, shall become effective on the 1st day of July, [19]90. It shall remain in effect until terminated by the undersigned employer giving written notice to [NECA] and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the applicable labor agreement.

The judge found and the record establishes that all of the parties interpreted the language "then current anniversary date" to mean the expiration date of the contract.

[5] The January 2, 1992 letter stated in pertinent part:

> Please be notified that as of the date posted on this letter, Haas Electric, Inc., 82 Main Street, South Hadley, Mass., is terminating the Labor Agreement between Haas Electric Inc., and Local #7 I.B.E.W.
>
> Haas Electric Inc., also acknowledges that this intent becomes final 150 days from date of notification, according to mutual agreement.
>
> It is with deep regret that Haas Electric Inc., must make this decision after 36 years of membership as an organized labor contractor.

the Respondent was participating in the negotiations on any basis other than as a member of the multiemployer bargaining association, that it did not intend to be bound by the results of the negotiations, or that it was not bargaining for any terms that would extend beyond the original 1993 expiration date of the contract. As found by the judge, the Union eventually agreed to substantial concessions, including a 1-year deferral of two upcoming wage increases, a lower wage "B-rate" for projects valued at less than $150,000, and reduced annuity contributions. In return, NECA agreed to extend the contract through June 30, 1994.

On June 11, 1992, the Union sent the Respondent a letter of assent to sign that would bind the Respondent to the renegotiated agreement, referred to by the parties as the 1992–1994 agreement. The Respondent never signed it. Instead, on June 29, 1992, the Respondent sent a letter to David Keany, manager of NECA, which it copied to the Union. Although, as noted above, the Respondent had joined in requesting the reopener negotiations, had participated in the negotiations, and was fully aware that the negotiations had been completed, the letter to Keaney began with the statement that, "It has come to my attention that NECA is seriously considering renegotiating the existing contract with Local 7, IBEW." The letter went on to state that:

> It is the position of Haas Electric, Inc. that NECA has already been notified that Haas Electric, Inc., has withdrawn its authorization to have NECA act as its bargaining agent with the Local. Haas Electric hereby reaffirms its letter of January 2, 1992, notifying yourself and Local 7 of its intentions. Therefore, Haas Electric does not agree to be bound by any revisions to the existing agreement dated July 1, 1990 between Western Massachusetts Chapter, NECA and Local 7, IBEW.

Despite the Respondent's assertion in the letter that it did not agree to be bound by any revisions to the original 1990–1993 agreement, and its refusal to sign the letter of assent to the renegotiated agreement, it is undisputed that the Respondent did in fact take advantage of every one of the concessions negotiated by NECA with the Union, and that the terms and conditions it applied to its employees effective July 1, 1992, were those set forth in the renegotiated 1992–1994 agreement rather than those in the original 1990–1993 agreement.

On November 4, 1992, the Respondent sent another letter to NECA, this time stating that "effective November 1, 1992 [it] has resigned its membership in [NECA]." Thereafter, however, NECA members began complaining that the concessions granted by the Union had not been enough to make them competitive and that further concessions were needed. On December 17, 1992, and February 22, March 14, April 30, May 19, and June 3, 1993, NECA and the Union conducted another series of negotiations. Notwithstanding the Respondent's purported resignation from the NECA, Whitelock, who had been appointed to a 1-year term as vice president of NECA, attended these negotiations. Haas admittedly directed Whitelock to attend the negotiations and report back to him. Again, at no time during the negotiations did Whitelock say anything that would indicate that the Respondent was participating in the negotiations on a different basis from the other contractors on whose behalf NECA was bargaining, or that it was negotiating only for concessions for the period up to but not after June 30, 1993.

A tentative written agreement was reached on June 3, 1993, but the Union's membership refused to ratify it because of a provision enabling contractors to bypass the union hiring hall up to five times per year. NECA withdrew that provision and an actual agreement was reached around the end of June. Under the agreement**,** the Union agreed to the elimination of the January 1, 1994 wage increases and the removal of restrictions on portability, among other things, in return for which the contract was extended to June 30, 1996 (the "1993–1996 agreement"). All the concessions negotiated by the parties were effective after June 30, 1993. The parties stipulated that no one from the Respondent attended negotiations after May 19, and Whitelock indicated that he did not attend any meetings "on behalf of NECA" after June 30, 1993. After June 30, 1993, the Respondent ceased to recognize the Union and to abide by the contract.

Discussion

In *John Deklewa & Sons*,[6] the Board held that a collective-bargaining agreement permitted by Section 8(f) is enforceable for its term through the mechanism of Section 8(a)(5), absent repudiation by the unit employees in a secret-ballot election. Subsequent cases have established that a construction employer may become bound to successive 8(f) contracts, all enforceable under Section 8(a)(5), if the employer has expressly given continuing consent to a multiemployer association to bind it to future contracts and the employer has taken no timely or effective action, consistent with its own agreement, to withdraw that continuing consent from the association.[7]

[6] 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[7] See *Kephart Plumbing,* 285 NLRB 612 (1987); *Reliable Electric*, 286 NLRB 834, 835–836 (1987); *City Electric,* 288 NLRB 443, 444 (1988); and *Baker Electric Co.*, 317 NLRB 335 fn. 2 (1995), enfd. mem. 105 F.3d 647 (4th Cir. 1997), cert. denied 522 U.S. 1046 (1998). Cf. *James Luterbach Construction Co.*, 315 NLRB 976, 981 fn. 11

In the instant case, the judge found that the Respondent gave timely notice of its intent to withdraw from the bargaining relationship and did not act inconsistently with that notice. We disagree. In our view, the Respondent failed to timely withdraw from multiemployer bargaining and its conduct was inconsistent with any attempted withdrawal. Accordingly, we find that the Respondent is bound both by NECA's 1992–1994 contract extension and by its 1993–1996 extension.

We first deal with the Respondent's contention that it was not bound by the agreement negotiated by NECA extending the contract from June 30, 1993, until June 30, 1994. The Respondent claims that its letter of January 2, 1992, constituted a timely revocation of NECA's authority to negotiate on its behalf. We disagree. The Respondent's January 2, 1992 letter purports only to terminate the 1990–1993 collective-bargaining agreement and to withdraw recognition of the Union, effective 150 days later. The letter says nothing at all about revoking NECA's authority to negotiate on the Respondent's behalf. Since the contract in effect at that time was not scheduled to expire until June 30, 1993, more than a year later, the letter constituted at most an anticipatory breach of a valid contract.[8] The unrevoked authority previously granted to NECA, by its terms, made NECA the Respondent's bargaining representative "for all matters . . . pertaining to the current and *any subsequent* approved Inside labor agreement." See footnote 4, above (emphasis added). Because the Respondent did not timely revoke NECA's authority prior to the completion of the 1992 reopener negotiations, the Respondent was bound by the contract extension that NECA negotiated on its behalf. See *Gary's Electrical Service Co.,* 326 NLRB 1136, 1140 (1998), enfd. 227 F.3d 646, 653–654 (6th Cir. 2000), and cases cited supra, fn. 6.

Further, the Respondent's vice president, Whitelock, actively participated in the multiemployer negotiations in 1992 without announcing that he was there for a limited purpose. Not until after the 1992 negotiations were completed in early June, and the economic concessions and contract extension agreed to, did the Respondent make any actual attempt to revoke NECA's bargaining authority. That attempt, made by letter dated June 29, 1992, was too late to prevent the Respondent's being bound by NECA's agreement to a 1-year contract extension until June 30, 1994. It was also a patent attempt to avoid the legal consequences of its prior actions.

As discussed, the June 29 letter, although written *after* completion of the reopener negotiations that the Respondent had helped initiate and participated in, and *after* the 1992–1994 contract extension had been agreed to, was worded to suggest that the Respondent had only just learned that NECA was "considering renegotiating the existing contract." It purported to "reaffirm" a prior withdrawal of authorization to NECA to act as its bargaining agent when in fact, as previously discussed, the January 2, 1992 letter to which it referred said nothing about withdrawing NECA's authority to bargain on its behalf. Rather, it merely threatened (unlawfully) to terminate the existing contract and withdraw recognition from the Union within 150 days, or by June 1—a date which had already passed at the time of the June 29 letter without the threatened actions taking place. It asserted that the Respondent was not bound by any revisions to the original 1990–1993 agreement when in fact the Respondent intended to take, and did take, full advantage of the deferred wage increases and lower wage rates negotiated on behalf of NECA members in the group bargaining in which it had just participated. In context, therefore, we find that the June 29 letter was simply an after-the-fact attempt by the Respondent to position itself so it could have "the best of both worlds," i.e., take advantage of the concessions contained in the 1992–1994 agreement obtained through group bargaining while purporting not to be bound by the agreement.[9]

For these reasons, the June 29, 1992 letter was ineffective to cancel NECA's preexisting written authority to bind the Respondent to the already negotiated 1992–1994 agreement. The remaining question is whether the letter was effective to communicate an intent to terminate NECA's authority to bind the Respondent to the subse-

(1994) (distinguishing *Kephart*, supra, and *Reliable,* supra, as cases "where the employer has expressly given continuing consent to bargain a successor contract on a multiemployer basis").

[8] Had the Respondent in fact taken the action specified in the letter, it would have violated Sec. 8(a)(5) of the Act. See *John Deklewa & Sons*, supra at 1377–1378, 1386–1389; *C.E.K. Industrial Mechanical Contractors v. NLRB*, 921 F.2d 350 (1st Cir. 1990).

[9] Our dissenting colleague tacitly concedes, as he must, that the Respondent's January 2, 1992 letter was ineffective to terminate the 1990–1993 collective-bargaining agreement within 150 days, as the letter stated, and that the Respondent was bound to the 1990–1993 agreement until its expiration. However, he finds that the Union knew or should have known from the Respondent's letters of January 2 and June 29, 1992, that the Respondent would withdraw from multiemployer bargaining when the agreement expired in June 1993. As explained above, the letters announced different plans with distinct legal consequences and were followed by inconsistent conduct. Whether read singly or together, the letters are anything but "clear" as the dissent postulates. Therefore, the letters cannot support a finding that the Respondent effectively withdrew from multiemployer bargaining. Moreover, the Respondent's conduct subsequent to each letter was inconsistent with its correspondence, negating any legal effect the letter may have had. The only thing that is clear from the totality of the Respondent's words and deeds is that it sought whatever advantages it could at the expense of its "contractual and legal obligations."

quently negotiated 1993–1996 agreement. We find that it was not.

On its face, the June 29, 1992 letter does not purport to terminate NECA's bargaining authority from that point forward. Instead, as previously discussed, the letter "reaffirms" the letter of January 2, 1992, claiming, incorrectly, that that letter (which only threatened a breach of contract) had announced a termination of NECA's bargaining authority. This letter does not constitute good-faith compliance with the letter of assent's requirement that to effectively terminate NECA's bargaining authority there must be written notice, timely served on NECA and the Union, that NECA is no longer authorized to act as the Respondent's bargaining agent.

Moreover, even if the June 29, 1992 letter were liberally construed to convey an intent to revoke NECA's bargaining authority in the future, the Respondent subsequently engaged in conduct that was inconsistent with that intent and that, in our judgment, precludes a finding that it unequivocally withdrew the authority expressly granted NECA in the letter of assent. See *Dependable Tile Co.*, 268 NLRB 1147 (1984), enfd. as modified sub nom. *NLRB v. Hartman,* 774 F.2d 1376, 1383–1384 (9th Cir. 1985). (If an employer subsequently acts inconsistently with its announced withdrawal, its conduct nullifies the withdrawal.)[10]

In so concluding, we reject the Respondent's contention that its November 4, 1992 letter to Keany resigning membership in NECA "effective November 1" was yet another reaffirmation of its revocation of NECA's bargaining authority. That November 4 letter was not copied to the Union, nor is there evidence in the record that it was sent to or received by the Union. Thus the letter "reaffirmed" nothing so far as the Union was concerned. Furthermore, there is no necessary connection between NECA membership and NECA bargaining authority. Nothing in the letter of assent made NECA's authority to represent the Respondent dependent on NECA membership or suggested that resignation of membership would be effective to terminate that authority.[11] In any event, against the backdrop of the Respondent's conduct, the November letter provides no more probative support for the Respondent's argument than its June 29 letter. Both letters were contradicted by the Respondent's subsequent wavering course of conduct—a course that was not materially different from the preceding year.

Thus, notwithstanding the June 29 and November 4 letters purportedly disassociating the Respondent from NECA, between December 1992 and June 3, 1993, Vice President Whitelock attended the reopener negotiations in which NECA sought further concessions from the Union. As before, he expressed no reservations of any kind to the Union. Whitelock did not, for example, inform the Union that he was present for any limited purpose or that the Respondent did not intend to be bound by any new agreement that might be reached. Cf. *Walt's Broiler,* supra (participation in group negotiations found not inconsistent with withdrawal from multiemployer bargaining where employers' letters to union and statements at the outset of negotiations and during subsequent bargaining session show unequivocal desire not to be bound to any agreement as a group). From the perspective of the other participants in group bargaining, therefore, Whitelock was vested with apparent authority to represent the Respondent at the bargaining table for the purpose of renegotiating the 1992–1994 contract, and the Respondent was acting in a manner that was substantially the same as it did during the 1992 negotiations.

At the hearing (as opposed to the 1992–1993 reopener negotiations themselves), the Respondent for the first time did provide an explanation for its presence at the NECA negotiations following its purported resignation from NECA (of which Whitelock was and remained a vice president). That explanation—that Respondent was

[10] While the Board's ground rules governing multiemployer bargaining have evolved over time, see *Charles Bonanno Linen Service v. NLRB*, 454 U.S. 404, 410–411 (1982), the Board has consistently held that where notice of withdrawal from multiemployer bargaining is required that notice must be unequivocal. See, e.g., *Bearing & Rim Supply Co.*, 107 NLRB 101, 102–103 (1953); *I. C. Refrigeration Service,* 200 NLRB 687, 689 fn. 7 (1972); *NLRB v. Callier's Custom Kitchens*, 630 F.2d 595, 598 (8th Cir. 1980). The tactic of hedging one's bets—signaling withdrawal but remaining a participant in the hope of getting the benefit of the group bargain if it turns out to be advantageous—has long been deemed inconsistent with a genuine withdrawal from group bargaining. *Dependable Tile Co.,* supra at 1147; *Michael J. Bollinger Co.,* 252 NLRB 406 (1980), enfd. 705 F.2d 444 (4th Cir. 1983). Accord: *Sheet Metal Workers Local 19 v. Herre Bros., Inc.*, 201 F.3d 231, 244 (3d Cir. 1999) ("[A]n employer may not attempt to 'secure the best of two worlds' by purportedly withdrawing bargaining authority but then remaining a member of a multiemployer unit in the hope of securing advantageous terms through group negotiations."). Where, as here, the Respondent, by executing the letter of assent, has unequivocally authorized NECA to act as its representative until that authority is terminated in writing, we consider it appropriate to evaluate the effectiveness of any purported termination by reference to the established legal principles governing unequivocal withdrawals.

[11] We note that it is not uncommon for employers who are not members of associations to be represented by those associations in bargaining. See, e.g., *NLRB v. Black*, 709 F.2d 939, 941 fn. 1 (5th Cir. 1983) (letter of *assent bound nonmember to NECA's master agreement); Cox Corp. v. NLRB*, 593 F.2d 261, 262 (6th Cir. 1978) (nonmember employer that delegated bargaining authority to association is bound by association-union agreement); *Twin City Garage Door Co.,* 297 NLRB 119, 129–130 (1989) (same). Conversely, in a number of cases the Board has found that employers that remained members of an employers' association were nonetheless not bound by contracts negotiated by that association. See, e.g., *Ladies Garment Workers (West Side Sportswear)*, 286 NLRB 226, 230 (1987), enfd. mem. 853 F.2d 918 (3d Cir. 1988); *Walt's Broiler,* 270 NLRB 556, 557–558 (1984).

present only to participate in negotiations about interim changes in the 1990–1993 contract expiring on June 30—eludes comprehension. The subject of the negotiations was modification of the 1992–1994 NECA contract that the Respondent followed in practice but refused to acknowledge as legally binding. There was no discussion of the 1990–1993 contract, which had already been supplanted as a result of NECA's renegotiation of its terms. And since, according to the Respondent, NECA no longer had any authority to act on its behalf, nothing that NECA agreed to in the 1992–1993 reopener discussions could have any legal consequences for it. In short, the Respondent's own account of its actions provides no logical explanation for its presence at the bargaining table.[12] The only plausible explanation for its presence is that, hearing that NECA was seeking further economic concessions from the Union, the Respondent decided to hedge its bets by participating in the negotiations and putting itself in a position where it could again take the benefit of NECA's greater bargaining strength.

In sum, in the absence of the Respondent's providing an alternative explanation at the time of its participation in the 1993 reopener negotiations, the other participants in those negotiations had reasonable cause to believe that the Respondent was present because it once again consented to work out on a group basis the economic problems that it and the other contractors were experiencing under their current contract. Its presence during those negotiations thus constituted a retraction of its prior, ineffective attempts at withdrawal. See *NLRB v. Hartman,* supra at 1383–1385. Having participated in the negotiations without reservation in an attempt to secure more advantageous terms through group negotiations, the Respondent cannot avoid being bound by the 1993–1996 agreement that NECA reached with the Union about the end of June 1993.[13]

On the basis of the foregoing, we find that the Respondent violated Section 8(a)(5) and (1) of the Act when it abrogated applicable collective-bargaining agreements that were effective through June 30, 1996, unilaterally changed wages, benefits, and terms and conditions of employment, and withdrew recognition from the Union.[14]

CONCLUSIONS OF LAW

1. Haas Electric, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. IBEW Local 7, a/w International Brotherhood of Electrical Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union was the exclusive representative of employees in the following appropriate unit within the meaning of Section 8(f) of the Act:

> All journeymen and apprentice electricians employed by the Respondent, but excluding all other employees, guards and supervisors as defined in the Act.

4. By withdrawing recognition from the Union on July 1, 1993, and since that date, refusing to comply with the 1992–1994 and 1993–1996 collective-bargaining agree-

[12] Our dissenting colleague accepts the Respondent's after-the-fact explanation for its presence at the NECA negotiations. For the reasons already offered, we do not. As we have pointed out, it would have been simple for the Respondent to provide the other participants in the negotiations with a clear and timely explanation for its own limited participation, and thus to avoid being bound, if that is what it had intended. The Respondent's failure to do so is further indication of a desire to hedge its bets.

[13] While for the foregoing reasons we have found that the Respondent failed effectively to terminate the letter of assent's express authorization of NECA to make contracts on its behalf, we would reach the same result if the letter of assent was disregarded and the question was reframed to ask whether the Respondent's conduct during the 1992–1993 renegotiations manifested an unequivocal assent to be bound by group action. Even without written authorization being given to an association, an employer may by a course of conduct cloak an employer association with apparent authority to bind it to an agreement. See *Sandia Stucco Co.,* 319 NLRB 850, 856 (1995), enfd. mem. 103 F.3d 135 (8th Cir. 1996); *Hillsdale Inn,* 267 NLRB 982 fn. 2, 988–990 (1983), enfd. 764 F.2d 739, 742–743 (10th Cir. 1985). The Respondent placed Whitelock in a position where it was reasonable for the Union to assume that he was representing the Respondent and participating with other employers in a joint effort to secure more favorable terms from the Union than the ones under which they all were currently employing union labor. Whitelock had acted for the Respondent in the negotiations leading to the prior modification of the NECA agreement, he attended these negotiations at the Respondent's direction, and he gave the Union no reason to believe that he was present for a different purpose this time. Cf. *Snellco Construction,* 292 NLRB 320, 326–327 (1989) (prior course of conduct and failure to disclose limitations on authority grounds for finding agent cloaked with apparent authority to bind employer).

[14] The result we reach here is not inconsistent with the decision of a divided Board in *James Luterbach Construction Co.,* 315 NLRB 976 (1994). There, a majority of the Board (Members Stephens and Cohen; Chairman Gould, writing separately) agreed that the ground rules for negotiating multiemployer bargaining agreements set forth in *Retail Associates,* 120 NLRB 1375 (1958), are inapplicable to bargaining for the renewal of an 8(f) contract. *Luterbach* holds that an 8(f) employer, unlike an employer subject to the *Retail Associates* rule, does not risk becoming bound to a multiemployer agreement through mere inaction. Beyond this principle, *Luterbach* states no rule, since a Board majority could not agree on one; the issue thus awaits decision in a future case. Here, however, we need not reach the question. Instead, we follow decisions decided before and after *Luterbach*, involving employers like the Respondent who have expressly given an association continuing consent to bargain a successor contract on a multiemployer basis. Nothing in *Luterbach* undercuts the well-settled agency principle that an employer is bound by an agreement negotiated by an agent with apparent authority to act on its behalf. Indeed, the opinion of Members Stephens and Cohen acknowledges that principle. 315 NLRB at 981 fn. 13.

ments between NECA and the Union, the Respondent has refused to bargain with the Union as the exclusive representative of the employees in the unit described above in violation of Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent violated its obligation under the Act by withdrawing recognition from the Union, abrogating the collective-bargaining agreements to which it was bound, and unilaterally changing employees' wages, benefits, and terms and conditions of employment, we shall order that it cease and desist therefrom. Further, we shall order that the Respondent give retroactive effect to the terms of the 1992–1994 and 1993–1996 collective-bargaining agreements between NECA and the Union, and that it make whole the employees and the Union for losses, if any, they may have suffered by the Respondent's refusal to honor the agreements, such payments to be computed as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970); *Kraft Plumbing & Heating*, 252 NLRB 890 (1980); and *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979),[15] with interest to be computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Haas Electric, Inc., South Hadley, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to abide by the terms of the collective-bargaining agreements between the National Electrical Contractors' Association of Western Massachusetts and the Union that were effective through June 30, 1996, unilaterally changing unit employees' terms and conditions of employment, and withdrawing recognition from the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Give retroactive effect to the terms and conditions of the collective-bargaining agreements between NECA and the Union that were effective through June 30, 1996, and make the employees and the Union whole for losses, if any, they may have suffered as a result of its refusal to abide by the aforesaid agreements, with interest, as described in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and contributions due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its South Hadley, Massachusetts facility, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time on or since July 1, 1993.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN HURTGEN, dissenting.

Contrary to my colleagues, I find that the Respondent timely withdrew from multiemployer bargaining and severed its 8(f) relationship with the Union at the termination of the parties' contract ending June 30, 1993. I therefore do not find that the Respondent violated Section 8(a)(5) by abrogating subsequent multiemployer collective-bargaining agreements, making unilateral changes in wages, hours, and other terms and conditions

[15] We disavow the judge's assertion that any remedy in this case should be prospective because of delays in the processing of the case. The Respondent committed the unfair labor practices that gave rise to the instant matter, and the Board is not required to place the consequences of a delay, even if inordinate, on wronged employees to the benefit of a wrongdoing employer. *NLRB v. J.H. Rutter-Rex Mfg. Co*., 396 U.S. 258, 263 (1969). In accordance with *Reliable Electric Co*., 286 NLRB 834, 836 (1987), however, we will not extend the make-whole remedy for noncompliance with the provisions of the applicable 8(f) agreements beyond the expiration date of the 1993–1996 contract.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of employment, or by withdrawing recognition from the Union.

The Respondent once belonged to a multiemployer association (NECA). The contract between NECA and the Union ran until June 30, 1993. However, the parties intended to engage in negotiations in 1992 to modify and extend that contract to June 30, 1994. Accordingly, on January 2, 1992, the Respondent advised the Union as follows:

> Please be notified that as of the date posted on this letter, Haas Electric, 82 Main Street, South Hadley, Mass., is terminating the Labor Agreement between Haas Electric Inc. and Local # 7 I.B.E.W.
>
> Haas Electric Inc. also acknowledges that this intent becomes final 150 days from date of notification, according to mutual agreement.
>
> It is with deep regret that Haas Electric must make this decision after 36 years as an organized labor contractor.

The January 2 letter was written and sent prior to the NECA-Union "contract extension" negotiations which began in March 1992. My colleagues nonetheless argue that the letter did not withdraw bargaining authority from NECA. I disagree. The letter clearly references the 150-day notification period of the letter of assent, i.e., the letter by which the Respondent joined NECA. The 150-day period is the time for withdrawing from NECA. Thus, the reference was clearly to withdrawal from NECA. Further, the withdrawal was timely under the letter of assent, i.e., it was 150 days prior to the June 30, 1993 expiration of the then-current contract.

The Respondent's intention to withdraw from NECA was also made clear by its reference to the termination of "36 years of membership as an organized labor contractor." The obvious reference was to the relationship and not simply to the current contract.

Neither the Union nor NECA questioned the meaning of the letter. Clearly, the letter was intended—and understood—to be a withdrawal from multiemployer bargaining and termination of the Respondent's 8(f) relationship with the Union. Concededly, the letter is incorrect to the extent that it says that the Respondent will terminate the contract 150 days from January 2, 1992, i.e., on or about June 2, 1992. The Respondent honored the contract until its expiration on June 30, 1993. Thus, the obvious intent was not to end the contract, but rather to end the relationship "after 36 years" of the relationship.

My colleagues say that the Respondent acted inconsistently with an intent to withdraw from multiemployer bargaining. They cite the fact that the Respondent's representative attended negotiation sessions in 1992 and later up to and including May 19, 1993. However, the Respondent was bound by the 1990–1993 contract until June 30, 1993, and thus had a substantial interest in attending negotiations over interim changes that would apply to that contract.[1] As the judge found, interim negotiations were very informal. There was no formal agenda, and no meeting minutes were distributed to the contractors. Thus, contractors such as the Respondent had no way of knowing what interim changes were under consideration or how they would affect them unless they attended the negotiations. (For example, at an April 1993 meeting, the parties discussed a 40- to 50-cent per hour wage increase to take effect on June 1, 1993.) As soon as the Respondent's representative learned that the negotiations would include a proposal for a contract extension beyond June 30, 1993, he ceased attending the negotiations. Thus, contrary to the majority, the Respondent's postrevocation conduct was consistent with its intent to withdraw bargaining authority.

Respondent sent another letter dated June 29, 1992. Although this letter, by itself, was too late to accomplish withdrawal as to the 1992 negotiations, it nonetheless reaffirmed the timely January 2 letter. In addition, it was timely with respect to the 1993 negotiations.[2]

Accordingly, I find that, by its January 2, 1992 letter to the Union, reaffirmed thereafter in a June 29, 1992 letter, the Respondent withdrew from multiemployer bargaining and ended its relationship with the Union effective on the termination day of the 1990–1993 contract. I therefore would dismiss the relevant 8(a)(5) allegations.

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[1] As noted, the Respondent's contract obligation extended to June 30, 1993. The Respondent's interest in the terms and conditions until that date was obvious. Contrary to the majority, there was no duty or need to explain this obvious point to the Union.

[2] The letter included the following:

> It is the position of Haas Electric, Inc. that NECA has already been notified that Haas Electric, Inc. has withdrawn its authorization to have NECA act as its bargaining agent with the Local. Haas Electric hereby reaffirms its letter of January 2, 1992, notifying yourself and Local 7 of its intentions. Therefore, Haas Electric does not agree to be bound by any revisions to the existing agreement dated July 1, 1990, between Western Massachusetts Chapter, NECA and Local 7, I.B.E.W.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to abide by the terms of the collective-bargaining agreements between the National Electrical Contractors' Association of Western Massachusetts and the Union effective through June 30, 1996, and WE WILL NOT unilaterally change unit employees' terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL forthwith give retroactive effect to the terms and conditions of the collective-bargaining agreements between NECA and the Union that were effective through June 30, 1996, and make the employees and the Union whole for losses, if any, they may have suffered as a result of our refusal to abide by the aforesaid agreements, with interest.

HAAS ELECTRIC, INC.

Don Firenze, Esq., for the General Counsel.
Daniel J. Sheridan, Esq., of South Hadley, Massachusetts, for the Respondent.
Aaron D. Krakow, Esq., of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. On July 26, 1993, IBEW Local No. 7, affiliated with International Brotherhood of Electrical Workers, AFL–CIO (the Union) filed an unfair labor practice charge alleging that Haas Electric, Inc. (Respondent or Haas) violated Section 8(a)(1) and (5) of the Act by refusing to abide by a collective-bargaining agreement and by unilaterally changing terms and conditions of employment. On September 23, 1993, the Union amended its charge, alleging that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to abide by a collective-bargaining agreement, unilaterally changing terms and conditions of employment and withdrawing recognition from IBEW Local No. 7.

On September 30, 1993, the Regional Director issued a complaint and notice of hearing. On October 14, 1993, the Respondent filed a timely answer contesting the allegations contained in the complaint.

On December 1, 1993, the Region rescheduled the hearing from December 16, 1993, to February 28, 1994. On February 25, 1994, the Region postponed the hearing indefinitely. Nearly 3 years later, on January 2, 1997, the Region determined that the Respondent properly withdrew from the Union and issued an order partially withdrawing the complaint and partially dismissing the charge. Almost 7 months later, on August 1, 1997, the Region issued an order rescinding its January 2, 1997 decision to partially withdraw the complaint and partially dismiss the charge. The Region also issued an amended complaint and notice of hearing.

The Respondent filed a timely answer to the amended complaint on August 18, 1997. A corrected copy of the answer was filed on August 19, 1997.[1]

On August 26, 1997, the Region issued an order scheduling the hearing for October 14, 1997. The hearing was held in Springfield, Massachusetts, on October 14 and 15, 1997. Briefs were filed by the parties on or about December 5, 1997. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, engages in the construction industry as an electrical contractor. It maintains a facility in South Hadley, Massachusetts. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues for Determination

Respondent has been an electrical contractor in Western Massachusetts since 1955. It operated as a union contractor pursuant to agreements between the Union and the National Electrical Contractors' Association (NECA). Respondent never had a collective–bargaining relationship with the Union independent of the NECA agreements with the Union. On July 1, 1993, Respondent withdrew recognition from the Union and has since operated as a nonunion contractor, making unilateral changes in the terms and conditions of employment. The amended complaint raises these issues for determination:

> 1. Did Respondent unlawfully withdraw from multiemployer bargaining?

[1] The corrected answer to the amended complaint changed the date in the sixth affirmative defense to properly reflect the date of June 30, 1993, rather than June 30, 1997.

2. If not, was Respondent nevertheless required to recognize the Union on a single-employer basis because it had perfected its right to Section 9(a) representative status pursuant to the voluntary recognition clause of the letter of assent?

3. Did Respondent make unlawful unilateral changes in the terms and conditions of employment of its electricians?[2]

B. Facts Relevant to the Multiemployer Bargaining Issue and Conclusions of Law

1. The letters of assent and contract status prior to Respondent's withdrawal of recognition

On May 31, 1988, Respondent and IBEW Local 36 (the Northampton, Massachusetts Local) signed a "Letter of Assent," which provided in pertinent part, that:

> In signing this letter of assent, the undersigned firm does hereby authorize Western Ma. Chapter N.E.C.A., Northhampton Division as its collective bargaining representative for all matters contained in or pertaining to the current and any subsequent approved Inside labor agreement between the Western Ma. Chapter N.E.C.A., Northampton Division and Local Union 36, IBEW. The Employer agrees that if a majority of its employees authorizes the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the exclusive collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites. This authorization, in compliance with the current approved labor agreement, shall become effective on the 1 day of June, 88. It shall remain in effect until terminated by the undersigned employer giving written notice to the Western Ma. Chapter N.E.C.A., Northampton Division and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of he applicable labor agreement.
>
> SUBJECT TO THE APPROVAL OF THE INTERNATIONAL PRESIDENT, IBEW

The International of the IBEW stamped its approval on this letter of assent on August 16, 1988.

On August 1, 1988, Local 36 and Local 284, the Pittsfield, Massachusetts local merged into Local 7. Prior to the merger, Local 7 had been the local for Hampton County (the Springfield, Massachusetts area).

On February 21, 1991, Respondent and the Union entered into a new letter of assent, which was identical to the quoted portion of the 1988 letter of assent, except that "Western Mass Chapter of N.E.C.A." and "Local Union No. 7, IBEW" appeared in place of "Western Ma. Chapter N.E.C.A., Northampton Division," and "Local Union 36, IBEW," respectively, and the effective date was now "1st day of July, [19]90."[3]

Since the merger of the three locals and continuing until Respondent's withdrawal of recognition from the Union on July 1, 1993, Respondent worked in the pre-merger jurisdiction of both Local 36 and Local 7 and always fully complied with the terms of the multiemployer contract then in force.

By the fall of 1991 the NECA contractors were claiming that economic conditions in the area were such that they could no longer compete with the nonunion contractors. The contractors demanded that the 1990–1993 contract be reopened and economic concessions be granted by the Union. Union Business Manager Douglas Bodman recalled that by around the first of the year, the parties had agreed to reopen the contract and that bargaining sessions for this purpose occurred approximately monthly from March or April 1992 through June 1992. In June 1992, agreement was reached to replace the 1990–1991 contract with the so-called July 1, 1992, through June 30, 1994 contract. The 1992–1994 contract made substantial concessions, including: (1) the 1-year deferral of two upcoming wage increases called for in the 1990–1993 contract; (2) a lower wage rate (the "B-rate") for projects less than $150,000 in size, which had previously only been available for Northampton projects, was extended throughout the Union's jurisdiction; (3) the annuity contributions were reduced; and (4) restrictions on the "portability" of electricians, which reflected the "turf" jealousies of the premerger locals, were eased. In return for these concessions, the only concessions which the Union received was an extension in the expiration date of the contract from June 30, 1993 to June 30, 1994.

2. Respondent's reasons for withdrawing recognition

Just prior to 1989, Respondent bid on, and was awarded, a job on the Phoenix Mutual Life Insurance Building in Enfield, Connecticut. After the job commenced, the International Union redrew the jurisdictional lines so that the Enfield jobsite switched from the jurisdiction of Local 7 to the Hartford, Connecticut Local. This resulted in a great deal of confusion and infighting between the Union Locals resulting in cost overruns and problems with completing the work in a proper and timely fashion. Due in large part to these problems with the Union, Respondent lost $400,000 on that job and exhausted its line of credit with its bank.

Because of its dire financial straits resulting from the losses on the Enfield job, combined with the recession which hit the construction industry in the involved region, Respondent went repeatedly to the Union and sought some relief from the wage rates contained in the contract in effect. The Local refused to do anything to change the rates or otherwise offer Respondent relief. Respondent's bank was also unwilling to offer further help. Thus, to save the business, its founder, owner and President, Frederick Haas used all of his personal resources to keep the business running. He also sent a letter to then Union Busi-

[2] That Respondent made unilateral changes in the terms and conditions of employment after it withdrew recognition from the Union on July 1, 1993, was admitted in Respondent's answer to par. 11(b) of the amended complaint. See also the stipulation of the parties that: "From and after July 1, 1993, Haas withdrew recognition from the Union, and ceased paying and honoring the contract and went non-union."

[3] The NECA multiemployer contract in force as of February 1, 1991, had a term which ran from July 1, 1990, through June 30, 1993. As of July 1, 1990, there were about 12 contractors in the multiemployer bargaining unit and in addition, there were about 20 "me-too" signatories.

ness Manager John Collins on January 2, 1992, notifying the Union that Respondent was terminating the agreement and getting out of the Union after 150 days. This letter reads:

> Please be notified that as of the date posted on this letter, Haas Electric Inc., 82 Main Street, South Hadley, Mass., is terminating the Labor Agreement between Haas Electric Inc., and Local #7 I.B.E.W. Haas Electric Inc., also acknowledges that this intent becomes final 150 days from date of notification, according to mutual agreement. It is with deep regret that Haas Electric Inc., must make this decision after 36 years of membership as an organized labor contractor.
>
> In the last five months this contractor through its NECA affiliation and with direct contact with Local #7 has pleaded its case that the economy that we work in, cannot support the labor cost, and Haas Electric Inc., has pointed out several ways that would help to keep its operation going, if some terms of easement of annuity, and by using a labor rate that is in effect in the Hamden district could be utilized. Changes that would only be for a short period of time to ease the crises. Labor Union #7 has not tackled this problem in a reasonable way, and obviously does not accept the hard fact that Western Mass., has lost 15,400 jobs in the past two years and the situation shows no sign of improving in the very near future.
>
> No one likes giving up any advantage one has, whether it is union wages and benefits, or a contractor's special customer, but everyone should realize that concessions must be made that will truly effect the problems of today, and put many of the concessions granted during normal bargaining sessions on hold during this crises. The Local Union must recognize that all contractors that sign the agreements must be given a fair chance to show a profit and pay their bills while they struggle to beat the competition and face the tough market place.
>
> Please respond to this communication and forward your expectations of this contractor and put a final legal date of termination in your reply.

The letter was sent by certified mail. Respondent also sent copies of the letter to the NECA Chapter Manager David Keaney, and the Union's International representative. Douglas Bodman, then the business representative for the Union, signed for and received the letter and delivered it to Collins. Neither the Local Union, the International Union, nor NECA responded to Respondent's letter. Just before preparing the January 2, 1992 letter, Haas resigned from his long-term union membership.

On June 11, 1992, the Union sent Respondent a letter of assent to sign indicating that Respondent would not get the market recovery money it had coming to it from the Union unless Respondent signed and returned the letter of assent.[4] Even though Respondent was owed market recovery money by the Union and was in desperate need of capital, Respondent refused to sign the letter of assent because it was withdrawing from the Union.

On June 29, 1992, Respondent wrote to David Keaney, referring to the January 2, 1992 withdrawal letter, reiterating that Respondent had withdrawn authorization for NECA to bargain on its behalf and stating that Respondent would not be bound by any revisions negotiated between the Union and NECA. Respondent also sent a copy of this letter to Union Business Manager John Collins. This letter reads as follows:

> It has come to my attention that NECA is seriously considering renegotiating the existing contract with Local 7, I.B.E.W. It is the position of Haas Electric, Inc. that NECA has already been notified that Haas Electric, Inc., has withdrawn its authorization to have NECA act as its bargaining agent with the Local. Haas Electric hereby reaffirms its letter of January 2, 1992, notifying yourself and Local 7 of its intentions. Therefore, Haas Electric does not agree to be bound by any revisions to the existing agreement dated July 1, 1990, between Western Massachusetts Chapter, NECA and Local 7, I.B.E.W.

On November 4, 1992, Respondent again wrote to NECA indicating that it had resigned from NECA and requesting to be informed of any commitment which might be in force after Respondent's departure from NECA. On December 21, Respondent once again wrote to NECA requesting written confirmation that NECA had received Respondent's letters indicating its withdrawal from the Union.

3. The concession negotiations during the term of the 1990–1993 contract and Respondent's role in those negotiations

As noted above, in the first half of 1992, negotiations were held between NECA and the Union to discuss interim concessions to the 1990–1993 contract. Haas Vice President Ralph Whitelock attended a number of those meetings on behalf of Respondent. Whitelock was aware, prior to attending negotiations, that Respondent had given notice of its intent to withdraw from the Union. Whitelock testified that he made no proposals during the negotiations and did not vote on any contract change to take effect after June 30, 1993. Bodman agreed that Whitelock made no proposals in the open negotiations, but noted that NECA proposals were formulated and votes were taken in private caucuses. Specifically, Whitelock testified that he did not vote on the contract extension.

As noted previously, the contract was extended 1 year and concessions were made. After the contract was so modified, Respondent abided by the modified terms, taking advantage of the concessions.

By the end of 1992, the NECA contractors informed the Union that the earlier concessions were not sufficient to restore competitiveness with the nonunion contractors. In response, the Union agreed to bargain over the possibility of granting further concessions. At the hearing, the parties stipulated that: (1) meetings for this purpose took place on December 17, 1992, February 22, March 14, April 30, May 19, and June 3, 1993; (2)

[4] The market recovery program (the target money program) was a program designed to assist union contractors in competing against nonunion contractors on certain targeted jobs selected by the Union. Upon completion of a targeted job, the Union would pay the union contractor a certain sum of money.

the last meeting attended by Respondent was the one on May 19, 1993; and (3) agreement was reached only at the June 3, 1993 meeting, subject to ratification.

The agreement reached on June 3, 1993, was reduced to writing on that occasion. In fact, however, this agreement was not ratified because the membership of the Union objected to one of its terms, viz, that on five occasions per year a contractor could bypass the hiring hall and recall a laid-off electrician within 90 days of his layoff. NECA responded by withdrawing this proposal and an actual agreement was reached around the end of June 1993.[5] Under this agreement, the raises scheduled for January 1, 1994, were eliminated, all restrictions on "portability" were removed, the first 25 electricians on the referral list were allowed to solicit work directly from the contractors and the contract was extended through June 30, 1996.

It is clear from the testimony of both Bodman and Whitelock, that through May 19, 1993, Whitelock attended almost all of the bargaining sessions which led to the 1993 concessions. Whitelock made no announcement that he was there for the limited purpose of protecting Respondent's interests only up until the time of its exiting the multiemployer unit. On the other hand, it is certainly a logical contention that Respondent's notice of intent to withdraw dated January 2, 1992, and its letter of June 29, 1992, reiterating that point, served to give notice of its limited interest in the negotiations.

The 1992–1994 contract, at section 3.05, provided for various wage increases ranging from 40- to 5-cent per hour to take effect on June 1, 1993. General Counsel's Exhibit 11 consists of letters from 7 NECA contractors, including Respondent, to NECA President and fellow contractor Thomas A. Schmitt, dated between April 28 and 30, 1993, and a letter dated April 29, 1993, from Schmitt to the Union. The letters to Schmitt all argue for the cancellation of the June 1, 1993 raises. Schmitt's letter does the same and encloses the other seven letters. Bodman testified that these eight letters were also received by the Union in ordinary course after the date of Schmitt's letter. The General Counsel and the Union contend that based on the timing of the letters and their similar messages, that their writers knew that they were intended for submission to the Union. I do not make that inference and credit Frederick Haas' testimony that he was unaware that his letter would be put to such a purpose. Haas did, however, candidly admit that when, in his letter to Schmitt, he referred to the June 1, 1993 raise as one "scheduled for July 1, 1993," it was because at the time he wrote the letter, his understanding was the erroneous one that the increase was in fact scheduled for July 1, 1993.

On the expiration of the contract on June 30, 1993, Respondent withdrew from the Union. Thereafter, in December 1993 or early January 1994, the Union pulled its members out of Respondent. At that time, 4 of the 10 union members working for Respondent went back to the Union. The remaining six stayed with Respondent.

[5] The contract was signed in late July 1993.

4. Conclusions with respect to the lawfulness of Respondent's withdrawal of recognition from the Union and from the multiemployer bargaining relationship

In *John Deklewa & Sons,* 282 NLRB 1375 (1987), the Board held that construction industry employers and unions may not unilaterally abrogate an 8(f) prehire contract during the term of the agreement, but that either party is free to repudiate the 8(f) relationship on expiration of the contract and all collective bargaining obligations would cease. *Deklewa* dealt with a statutory issue of what the law would require of an 8(f) employer in the absence of any agreement to the contrary by the parties (i.e., by means of a letter of assent). The Board in *Deklewa* was not faced with the issue of whether the parties could contract through a letter of assent to allow the employer to exit the 8(f) relationship prior to the contract's expiration date. Nothing in *Deklewa* precludes the parties right to freely contract and agree to allow the employer to announce its intention to withdraw prior to the expiration of the contract. However, in *Deklewa,* the Board held, inter alia, that an 8(f) employer was bound by the terms of the relevant collective-bargaining agreement until its expiration and then the employer was free to dissolve its relationship with the union.

The general rule for withdrawal from multiemployer bargaining was set forth in *Retail Associates, Inc.,* 120 NLRB 388, 395 (1958), where the Board held that such withdrawal required "adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations." The Board continued, "Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances." Further, even assuming that timely notice of intent to withdraw has been given under *Retail Associates,* supra, if the employer subsequently acts inconsistently with its announced intention, the Board will not consider the withdrawal to be effective. See *Dependable Tile Co.,* 268 NLRB 1147 (1984), wherein the Board concluded that active participation "in group negotiations for a *new* multiemployer agreement is clearly inconsistent with a stated intent to abandon group bargaining and negotiate separately." The Board also stated, however, if the employer "had merely participated in the sessions in order to administer the expiring contract," it would consider this action consistent with the stated intention to abandon group bargaining. As the administrative law judge explained in *Associated Shower Door Co.,* 205 NLRB 677, 682 (1973), an employer attempting to be a party to group negotiations while reserving the right to reject the outcome of such negotiations is unfairly seeking "the best of two worlds." Active participation in negotiations for a new contract remains a recommitment by an employer to multiemployer bargaining and appears to negate any attempt at withdrawal absent clear indication by the withdrawing party to the contrary. See *James Luterbach Construction Co*., 315 NLRB 976 (1994).

The General Counsel and the Union assert that, inter alia, Respondent's letter of withdrawal was not sufficient to effect Respondent's withdrawal from the multiemployer bargaining as it only states that Respondent was terminating his agreement

with the Local. I disagree. The letter, set forth above, does give notice that Respondent intends to terminate its relationship with the Union after 36 years, giving a clear inference of finality to the relationship. It references the 150-day notification period noted in the letter of assent, which is the amount of notification which must be given to effectively withdraw the authorization for NECA to bargain on its behalf. Moreover, no one from the Union or NECA questioned the meaning of the letter, which clearly indicates to me that they knew what Haas intended. I do not accept the Union's and General Counsel's contentions in this regard and find that the letter was clear, unequivocal and effective notice of Respondent's intent to withdraw from the multiemployer bargaining group and terminate its ties with the Union.

Even if the letter were not sufficient notice, Haas' subsequent letters made it clear that withdrawal was its intent. On June 11, 1992, Local 7 sent Haas a letter indicating that he had to execute an enclosed letter of assent in order to obtain the market recovery money it had coming to it. Haas refused to sign the letter of assent because it was withdrawing from the Union.

On June 29, 1992, Haas wrote to NECA, referencing the January 1992 letter, reiterating that Respondent had withdrawn authorization for NECA to bargain on its behalf and stating that Haas would not be bound by any subsequent agreements negotiated between Local 7 and NECA. Haas sent a copy of that letter to John Collins, Local 7's business manager. Again, neither NECA nor Local 7 responded.

On November 4, 1992, Haas again wrote to NECA indicating that it had resigned from NECA and requesting to be informed of any commitment which might be in force after Haas' departure from NECA.

On December 21, 1992, Haas once again wrote to NECA requesting written confirmation that NECA had received Haas' letters indicating its withdrawal from the Union.

The Union and the General Counsel next contend that by Whitelock's attendance at the negotiation sessions for interim concessions, and by Frederick Haas' April 1993 letter to NECA, Respondent has engaged in conduct inconsistent with its stated intention to withdraw from multiemployer bargaining and therefore nullifies the purported withdrawal. The evidence shows that in 1992 and in 1993, NECA and Local 7 were engaged in negotiations over mid-term concessions demanded by the contractors because of the downturn in the construction industry. They needed immediate relief from the terms and conditions of the existing contract. Respondent was not withdrawing from the Union until June 30, 1993.[6] Respondent was bound by the contract until that date and had every right to attend and take part in negotiations over interim changes that would apply to it before the withdrawal was effective.

These interim negotiations were very informal. There was no formal agenda of what was to be discussed during negotiations, no meeting minutes were distributed to contractors and there was no feedback from the Union or from NECA for contractors who did not attend the negotiations. Contractors such as Haas had no way of knowing what interim changes were being discussed and how they would affect them unless they attended the negotiations. The undisputed evidence shows that as soon as Whitelock learned that the negotiations would begin including a proposal for a contract extension, he ceased attending negotiations. The April 1993 meeting which Whitelock attended was specifically called to discuss the raise due to take effect on June 1, 1993, prior to Respondents planned withdrawal date.

Though Whitelock did not preface his participation in the interim negotiations with a stated disclaimer that Respondent was withdrawing on June 30, 1993, I do not believe such was necessary. The January 2 and June 29, 1992 letters made that clear. At the negotiations, Whitelock did not propose nor did he vote on changes which would take effect after June 30, 1993. I find that Respondent's participation in *interim* negotiations, limited to participation over changes to the *existing* contract, does not constitute an attempt to seek "the best of two worlds" in a successor agreement. Rather, it constitutes a rational attempt to control what responsibilities Respondent had under the contract to which it was a party and is not at all inconsistent with its notice of intent to withdraw.

Turning next to Haas' April 28, 1993 letter, it is addressed to NECA and complains of a wage increase it mistakenly states is to take place on July 1, 1993. The increase was actually to take place on June 1, 1993, and would have affected Haas for a month. Haas testified that the letter was not intended for the Union and I credit this testimony. I do not find that the letter is sufficiently inconsistent with Haas' earlier repeated statements of intention to withdraw to legally affect the withdrawal. Certainly it did not raise enough interest to even draw a question from either the Union or NECA.

I therefore find that Respondent gave clear and unequivocal notice of its intention to withdraw from multiemployer bargaining and sever its 8(f) relationship from the Union effective at the end of June 30, 1993, and that such withdrawal was lawful. That this date was extended does not in my opinion change the effective date of withdrawal, absent Respondent's consent. The interests of small contractors like Haas is not always consistent with NECA's interests and objectives. For example, in this case, Haas's withdrawal was based on Respondent's need to survive as a going business. On the other hand, NECA desired to maximize its membership so as to ensure its strength. NECA went so far as to promise the Union in writing to try to keep contractors from withdrawing. Thus NECA openly admitted its intent to pressure contractors to stay members even though Haas had a contractual right to withdraw. If Unions and multiemployer associations were allowed to renew and extend an existing agreement so as to deny employers the ability to properly withdraw in a timely fashion, *Deklewa*'s promise that 8(f) employers are free to withdraw recognition after the contract's expiration would be rendered hollow and illusory.

[6] The parties generally agree that the "anniversary date" refered to in the letter of assent would be the date of the expiration of the existing contract. Respondent asserts and I agree that this date was June 30, 1993, the expiration date of the existing contract at the time Respondent gave notice of its intention to withdraw.

The claim that Haas should not been able to take advantage of the concessions granted as part of the 1992–1994 contract unless it agreed to an extension of the contract is not compelling. This claim was not presented to Haas when it accepted the interim concessions. Haas, correctly in my opinion, was bound to follow the terms of the contract until June 30 1993. If the Union seriously considered Haas to be in violation of the agreement or an understanding with respect to the agreement, it was obligated to raise the point with Haas. As noted, Haas could not avoid the interim negotiations as it was not able to withdraw earlier than at the end of June 30, 1993.

C. Facts Relevant to the Issue of Whether the Union Achieved 9(a) Representative Status and Conclusions with Respect to this Issue

On or about January 21, 1991, the Union's business manager sent Respondent a letter along with a letter of assent and authorization cards signed by 10 of Respondent's employees. This letter reads:

> Enclosed please find copies of representation cards received from electrical workers currently employed by you.
>
> These cards represent a majority of employees desiring representation in matters of collective bargaining by IBEW Local Union 7.
>
> Please be aware that we do in fact represent a majority of electrical workers employed by you.

The parties stipulated that one of these cards, that of Respondent's vice president, Ralph Whitelock, is irrelevant to the issue of whether the Union ever demonstrated majority support among Respondent's electricians. Another of these cards, signed by Ralph Whitelock's son, is also irrelevant to this issue because it is undated and hence Respondent lacked notice of when it was signed or, consequently, whether this person was in its employ at the time of signing. The parties further stipulated with respect to the remaining eight cards that they were signed by the following persons on the following dates:

Donald Cloutier	11/4/87
Mark Lenelin	5/5/89
Denis Gareau	6/5/89
Daniel Morin	6/5/89
Jon Montemagni	8/11/89
Arthur Peters	sometime in 1990[7]
Laurence Charette	4/30/90
Jemmie Plasse	4/30/90

It was further stipulated that these eight persons were bargaining unit electricians of Respondent on the dates they signed their authorization cards and when Respondent received the cards. Bodman testified that union records established that these persons were members of the Union in good standing at the times they signed their cards and remained so at least throughout 1991. The parties also stipulated that at the time Respondent received these authorization cards, it employed 12 bargaining unit employees.

[7] Because the General Counsel had the burden of proof, Peter's card must be deemed to have been signed as early as possible in 1990, i.e., on January 1, 1990.

Respondent never replied to or challenged in any way the Union's January 25, 1991 letter prior to the institution of this proceeding. The Union never followed up on this letter and demanded recognition under Section 9(a) until the institution of this proceeding.

At all relevant times, Respondent has been an electrical contractor with the building and construction industry within the meaning of Section 8(f) of the Act. From its inception, Haas drew its labor pool from the Union's hiring hall without any showing of majority support. There is a strong presumption in the construction industry setting, that the relationship between an employer and a union is an 8(f) relationship. *Deklewa & Sons,* supra at 1387 fn. 41. The party who is trying to establish an 9(a) relationship must carry its burden and rebut that presumption. Id. "Under *Deklewa,* the Board presumes that parties in the construction industry intend their relationship to be an 8(f) relationship. Thus the burden is on the party who seeks to show the contrary, i.e., that the parties intend a 9(a) relationship." *Casale Industries,* 311 NLRB 951, 952 (1993); *J & R Tile, Inc.,* 291 NLRB 1034 (1988).

The essential elements for transforming an 8(f) relationship into a 9(a) one are: (1) an unequivocal demand for recognition by the union; (2) coupled with a contemporaneous showing of majority support; and (3) the unequivocal granting of recognition by the employer. The Union and the General Counsel contend that the 1988 and 1991 letters of assent constitute agreement by Haas to recognize the Union by some method of majority showing other than a Board-supervised election. They further contend that the January 25, 1991 letter from Local 7 to Haas containing 10 signed authorization cards was sufficient to establish majority support for the Union under Section 9(a) of the Act. I believe they are incorrect on both counts.

Both the 1988 and 1991 letters of assent provide in relevant part as follows:

> The employer agrees that if a majority of its employees authorizes the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the exclusive collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites.

Neither letter of assent indicates that an employer, who signs the document, agrees to voluntarily grant recognition under Section 9(a). Indeed, the Union must have recognized this fact as it changed the language in the 1992 letters of assent to expressly reference Section 9(a). Haas refused to sign the 1992 letter of assent. Neither the 1988 or 1991 letters of assent indicate that a signatory employer agrees that majority status can be established on a showing of authorization cards signed by a majority of its employees as opposed to a Board-supervised election or some other means of voluntary recognition. The law requires positive evidence that the union unequivocally demanded recognition as the employees' 9(a) representative and the employer unequivocally accepted it as such.

In *Goodless Electric Co.*, 321 NLRB 64 (1996), the Board held that the 1992 letter of assent, identical to the one which Haas refused to sign, without more, constituted a continuing unequivocal demand for voluntary recognition and a continuing unequivocal promise by the employer to grant voluntary recognition if the Union demonstrated majority support.[8]

Unlike the letter of assent in *Goodless,* and unlike the 1992 letter of assent which Haas refused to sign, the letters of assent involved in this case make no reference whatsoever to Section 9(a) of the Act. Similarly, Collins' letter to Haas on January 25, 1991, makes no reference to Section 9(a). Haas had no reason to believe that the letter was anything but a formality for the Union's records so that it could pay market recovery funds to contractors who employed Local 7 members. Indeed, the Union indicated that the letter was sent out to all contractors at the time. Haas filed the letter and never responded to it because it had no significance to him. The Union never called or wrote to Haas to tell him that it considered their relationship to be converted from an 8(f) one to one under Section 9(a). The Union continued to attempt to have Haas sign a letter of assent as if it had an 8(f) relationship with Haas. I believe that the Union's unsuccessful attempt to induce Haas to sign the 1992 letter of assent demonstrates that the Union knew the earlier letters of assent did not constitute a valid continuing demand and grant of recognition under Section 9(a). In this regard, neither the Union nor General Counsel called as a witness, the author of the January 1991 letter, John Collins. This is true though he is still a union member, a friend of the current business manager, and a resident of the city in which this hearing was held. Respondent requests and I make two adverse inferences with respect to this failure under the missing witness doctrine. "The familiar rule, accepted by the Board, [is] that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines,* 285 NLRB 1122, 1123 (1987). The first such inference is that Collins would have admitted that he understood Haas' letters of January 2 and June 29, 1992, as clear and unequivocal notices of withdrawal. The second is that Collins could not testify that he intended the January 25, 1991 letter to be a demand for recognition under Section 9(a).

Haas never expressly and unequivocally granted voluntary recognition under Section 9(a). Indeed, everything Haas sent to the Union subsequent to the January 1991 letter on the subject, expressly states Haas' intention to terminate its relationship with the Union. As noted above, the Union never responded to any of these notices, and specifically never raised the assertion that the Union enjoyed a 9(a) relationship with Haas.

Furthermore, if *NLRB v. Goodless,* is the law in this circuit, then there is a serious problem with the requisite showing of a contemporaneous showing of majority support. If, as the General Counsel and the Union contend, the 1988 letter of assent was a demand for recognition, there was no showing of majority support until, at the earliest, January 25, 1991. This is a period of 2-1/2 years between the execution of the letter of assent and the January 25, 1991 letter. In *NLRB v. Goodless,* the court found as a matter of law that a 1-year period between the demand and majority showing did not meet the requirement of being contemporaneous. The 1991 letter of assent was not signed until February 21, 1991. Its language, in terms of recognition, is clearly prospective in nature. Thus, it cannot refer to the January 25, 1991 letter and, therefore, cannot serve as consent to voluntary recognition based on a previous, alleged demonstration of majority support.

Assuming, arguendo, that January 25, 1991, was the date of demand for recognition and thus the date on which a contemporaneous showing of majority support must be made, the Union's attempt to perfect a 9(a) relationship still fails. At the time of the proffer of cards, there were 12 employees in the unit. Two of the cards were void ab initio, that of Whitelock and his son. Of the remaining eight cards, two, those of Charette and Plasse, had been signed within 1 year of the proffer. Seven cards were needed to demonstrate majority support. The remaining cards and their dates are Lenelin (May 5, 1989), Gareau and Morin (June 5, 1989), Montemagni (Aug. 11, 1989), and Peters (Jan. 1, 1990). I find that these cards are too old to satisfy the contemporaneous requirement. They are clearly too old to satisfy the court in *NLRB v. Goodless,* which adopted a 1-year requirement, citing an advice letter from NLRB General Counsel to Regional Director for Region 9, February 27, 1989. The cases in which the Board has allowed cards older than a year to be used to show majority support generally have involved some exceptional circumstance. There is no exceptional circumstance here. In the Board case of *Goodless,* the Board was dealing with cards which had all been signed at about the same time they were presented to the employer. There has been no reason advanced why cards from those of Haas' employees who wanted a 9(a) relationship could not have been obtained contemporaneously with the January 25, 1991 letter.

In conclusion, I find that the Union and the General Counsel have failed to show that a clear and unequivocal demand for recognition under Section 9(a) was made, that a clear and unequivocal grant of voluntary recognition was given, and have further failed to establish that the Union made a contemporaneous showing of majority support. I find that the Union and General Counsel have failed to establish that the Union ever perfected or enjoyed a 9(a) relationship with Haas Electric, Inc. Having previously found that Respondent lawfully withdrew from multiemployer bargaining and the Union at the end of June 30, 1993, I will recommend that the complaint be dismissed.[9]

[8] In *NLRB v. Goodless Electric Co.*, 124 F.3d 322, 323 (1st Cir. 1997), the court rejected, as contrary to Board precedent, that the 1992 letter of assent signed by Local 7 and another contractor constituted for the remainder of its term, both a continuing request by the Union for 9(a) recognition and a continuing promise by the employer to grant voluntary recognition if the Union demonstrated majority support.

[9] As the withdrawal was lawful, the unilateral changes in wages, hours, and working conditions made by Haas subsequent to June 30, 1993, were likewise lawful. In the event that this finding is subsequently overruled by the Board, it is strongly urged that the Board take into consideration the extreme delay that occurred between the filing of

the charge here and the trial of this case, some 4-1/2 years. For the majority of this period, Respondent was under the impression that the matter would be dismissed. None of the delay is attributable to Respondent.

[Recommended Order for dismissal omitted from publication.]